Supreme Court, U.S.
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No. 98-836

In The

Supreme Court of the United States

October Term, 1998

IMMIGRATION AND NATURALIZATION SERVICE AND ROSANNE SONCHIK, DISTRICT DIRECTOR,

Petitioners,

v.

DANIEL MAGAÑA-PIZANO.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Respondent, a legal permanent resident for more than twenty years who is deportable based on a single misdemeanor drug offense, is being held in executive custody and has been ordered deported based on the Attorney General's retroactive application of a 1996 amendment to the Immigration and Nationality Act (INA). After exhausting administrative remedies, respondent filed both a habeas corpus action in district court and, alternatively, a petition for review directly in the court of appeals to challenge his final deportation order on constitutional and non-constitutional grounds. The court of appeals, finding that both its own and the district court's jurisdiction was repealed by new INA amendments, held that preclusion of all review violated the Constitution and that the district court retained jurisdiction under 28 U.S.C. 2241 over both claims. The question presented is:

1. Whether the Antiterrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) repealed the jurisdiction of both the courts of appeals and the district courts over challenges to a deportation order raising claims of statutory construction and constitutional violation and, if so, whether AEDPA and IIRIRA violate the Suspension of Habeas Corpus Clause, Article III or the Due Process Clause of the Constitution.

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OPINIONS BELOW

Respondent adopts the petitioners' statement of the opinions below.

JURISDICTION

Respondent does not contest this Court's jurisdiction under 28 U.S.C. 1254(1).

STATUTES OR OTHER PROVISIONS INVOLVED

In addition to the provisions referred to in the Petition for Certiorari and reprinted in the Petitioners' Appendix:

U.S. Constitution, Art. III:

"Section 1. The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . . "

"Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, . . . to Controversies to which the United States shall be a Party. . . . "

U.S. Constitution, Amend. V:

"No person shall be . . . deprived of life, liberty, or property without due process of law;. . . . "

STATEMENT

The jurisdictional issue in this case is whether Congress has repealed *all* federal court jurisdiction to review statutory retroactivity and constitutional equal protection challenges to a final order of deportation and, if so, whether such repeal violates the Constitution. The underlying substantive issue, whether Section 440(d) of the Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, 1277, retroactively eliminates statutory eligibility for discretionary relief or violates equal protection, is not presented in this case because the court of appeals remanded those issues to the district court.

This case squarely presents whether either the courts of appeals or the district courts have jurisdiction to hear respondent's claims. Respondent sought judicial review of his final order of deportation both by means of a petition for review directly in the court of appeals and by means of a habeas corpus petition in the district court. Pet. Br. 10; Pet. App. 5a. The court of appeals consolidated the two actions into a single case and resolved the jurisdiction of both courts. Pet. App. 5a. In that respect, as noted by the government (Pet. Br. 28-29), the procedural posture of this case differs from *Goncalves v. Reno*, 144 F.3d 110 (1st Cir.), *petition for cert. filed*, ___ U.S.L.W. ___ (U.S. Nov. 18, 1998) (No. 98-835), because Goncalves filed only a habeas corpus action in district court, but not a petition for direct review in the court of appeals.

For the reasons stated below, *certiorari* should be denied. However, if the Court determines that review of the jurisdictional issue is warranted, respondent agrees

with the government that this case, unlike *Goncalves*, would allow the Court to "render a definitive holding regarding the jurisdiction of *both* the courts of appeals *and* the district courts. . . . " Pet. Br. 29 (emphasis original).

THE STATUTORY FRAMEWORK

1. *Relief from Deportation.* Under the INA, a legal permanent resident who becomes deportable based on a criminal conviction, like respondent in this case, has long been statutorily eligible to apply for discretionary relief if the two criteria set forth in 8 U.S.C. 1182(c) are satisfied. First, the legal permanent resident must have resided in the United States for seven consecutive years. Second, the legal permanent resident must not have been convicted of an "aggravated felony" and must not have served a term of imprisonment of five years or more. *See, e.g., Francis v. INS*, 532 F.2d 268 (2d Cir. 1976); Pet. Br. 3 n.2. Over half of the total number of applications for Section 1182(c) relief were granted during fiscal years 1989 through 1994.[1]

In 1996, before repealing Section 1182(c) altogether, Congress expanded the list of disqualifying convictions. Specifically, Section 440(d) of AEDPA mandated that aliens who committed some non-violent, non-aggravated offenses were no longer eligible for discretionary relief from deportation under 8 U.S.C. 1182(c), regardless of

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[1] *Mojica v. Reno*, 970 F. Supp. 130, 178 (E.D.N.Y. 1997) (citing U.S. DEP'T. OF JUSTICE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, STATISTICAL SHEET 1 (Jan. 19, 1995)), *aff'd sub nom. Henderson v. INS*, 157 F.3d 106 (2d Cir. 1998).

how long they have lived in the United States or how strong their ties are to this country.[2] The Board of Immigration Appeals (BIA) ruled *en banc* that Section 440(d) did not apply retroactively to applications pending when AEDPA was enacted. *In re Soriano*, Int. Dec. No. 3289 (BIA June 27, 1996) (Pet. App. 65a-97a). At the request of the INS, however, the Attorney General vacated the BIA's decision (Pet. App. 98a) and issued a nationally-applicable ruling that AEDPA's new restrictions apply to all Section 1182(c) requests. *Matter of Soriano*, Int. Dec. No. 3289 (AG Feb. 21, 1997) (Pet. App. 99a-112a).

Five months after AEDPA, Congress enacted IIRIRA. IIRIRA replaced Section 1182(c) altogether for immigration proceedings initiated on or after April 1, 1997. IIRIRA 309(a) & (c)(1), 110 Stat. 3009-625. Section 1182(c) remains in effect only for cases in which immigration proceedings were commenced *before* April 1, 1997. For all immigration cases initiated on or after April 1, 1997 – now called "removal proceedings" – IIRIRA enacted a successor form of relief called "cancellation of removal," 8 U.S.C. 1229b(a) (Supp. II 1996), with its own eligibility criteria and mandatory disqualifications.

Respondent was subjected to deportation based on a single misdemeanor conviction of being under the influence of controlled substances. Pet. App. 3a. That conviction did not constitute a disqualifying offense for Section 1182(c) relief before the statute was amended by AEDPA

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[2] AEDPA Section 440(d) added the following sentence to the end of Section 1182(c): "This subsection shall not apply to an alien who is deportable by reason of having committed any criminal offense covered in [enumerated INA provisions]."

440(d), and it is not a disqualifying offense for relief under the new IIRIRA "cancellation of removal" provision.

2. *Judicial Review.* Before AEDPA and IIRIRA, judicial review of final orders of deportation and exclusion was governed by 8 U.S.C. 1105a. Section 1105a provided that any alien subject to a final order of deportation – regardless of the basis for the order – was entitled to obtain judicial review by a petition for review directly in the court of appeals, 8 U.S.C. 1105a(a), and under some circumstances, by habeas corpus proceedings in the district court. 8 U.S.C. 1105a(a)(10).[3] The INA habeas corpus provision supplemented the "sole and exclusive" direct review procedure, and the circuit courts disagreed about when an alien could invoke it. *See, e.g., Nakaranurack v. INS*, 68 F.3d 290 (9th Cir. 1995); *Williams v. INS*, 795 F.2d 738 (9th Cir. 1986); *United States ex rel. Marcello v. INS*, 634 F.2d 964 (5th Cir. 1981).

a. AEDPA repealed the former habeas corpus provision in Section 1105a(a)(10) and added a provision (the precursor to the IIRIRA provision at issue here) stating that a final deportation order based on certain criminal grounds "shall not be subject to review by any court." AEDPA 440(a), 110 Stat. 1276.[4] The Ninth Circuit and

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[3] Section 1105a(a)(10) provided that "any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings."

[4] Section 440(a) was codified at 8 U.S.C. 1105a(a)(10) and provided: "Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered by [enumerated grounds of deportation] shall not be subject to review by any court."

other courts of appeals dismissed pending petitions for review under Section 440(a) on the ground that Congress had repealed their statutory jurisdiction to exercise direct circuit court review. *See Duldulao v. INS*, 90 F.3d 396 (9th Cir. 1996).[5] The circuit courts routinely found, however, that elimination of direct review did not foreclose all judicial review over deportation orders because the possibility of alternative avenues of review, including specifically habeas corpus, remained. *See Duldulao*, 90 F.3d at 400 n.4.[6]

b. IIRIRA further amended the INA's judicial review provisions. First, for administrative proceedings commenced on or after IIRIRA's effective date, April 1, 1997, it repealed Section 1105a and adopted a new permanent judicial review statute, Section 1252. The permanent provision and the various subsections cited by the government (with the arguable exception of subsection (g)) (*see* Pet. Br. 5-6), apply *only* to cases where the

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[5] *See also Mansour v. INS*, 123 F.3d 423 (6th Cir. 1997); *Turkhan v. INS*, 123 F.3d 487 (7th Cir. 1997); *Fernandez v. INS*, 113 F.3d 1151 (10th Cir. 1997); *Boston-Bollers v. INS*, 106 F.3d 352 (11th Cir. 1997); *Kolster v. INS*, 101 F.3d 785 (1st Cir. 1996); *Salazar-Haro v. INS*, 95 F.3d 309 (3d Cir. 1996), *cert. denied*, 520 U.S. 1239 (1997); *Hincapie-Nieto v. INS*, 92 F.3d 27 (2d Cir. 1996).

[6] *See also Mansour*, 123 F.3d at 426; *Williams v. INS*, 114 F.3d 82, 83-84 (5th Cir. 1997); *Fernandez*, 113 F.3d at 1155; *Chow v. INS*, 113 F.3d 659, 668 (7th Cir. 1997); *Kolster*, 101 F.3d at 790; *Salazar-Haro*, 95 F.3d at 311; *Hincapie-Nieto*, 92 F.3d at 30-31.

immigration proceeding is initiated on or after April 1, 1997.[7] Second, for cases (like respondent's) initiated *before* April 1, 1997, IIRIRA enacted special "transitional" judicial review rules. IIRIRA 309(a), (c)(1) & (4), 110 Stat. 3009-625, 626. These transitional provisions amend the judicial review procedures in former Section 1105a and apply only to a defined set of "pipeline" deportation and exclusion cases.[8] Respondent's case is governed by these transitional rules. Pet. Br. 6.

Like AEDPA 440(a), both the permanent and transitional provisions of IIRIRA restrict review of final orders based on enumerated criminal grounds. The transitional rule, which governs here, provides that "there shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed a criminal offense covered in [enumerated INA sections]."

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[7] IIRIRA 309(a) & (c)(1), 110 Stat. 3009-625. In a different context, the applicability of Section 1252(g) to cases pending on April 1, 1997, is presented to this Court in *Reno v. AADC*, No. 97-1252 (argued Nov. 4, 1998). Section 1252(g) provides:

> (g) Exclusive Jurisdiction
>
> Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act.

8 U.S.C. 1252(g) (Supp. II 1996).

[8] The transitional rules apply to cases initiated *before* April 1, 1997, if the BIA decision is issued *after* October 30, 1996. IIRIRA 309(c)(4), 110 Stat. 3009-626.

IIRIRA 309(c)(4)(G), 110 Stat. 3009-626.[9] The courts of appeals interpreted the transitional provision as they had the precursor provision in AEDPA 440(a) and held that it repealed their own jurisdiction to hear cases on direct review. But, as under AEDPA, the courts again noted that alternative grounds for seeking review, in particular in district court habeas corpus actions, were not foreclosed. *See, e.g., Lerma de Garcia v. INS*, 141 F.3d 215, 217 (5th Cir.), *reh'g en banc denied*, 159 F.3d 1358 (1998); *Turkhan v. INS*, 123 F.3d 487, 490 (7th Cir. 1997).

The petitioners' discussion of judicial review under AEDPA and IIRIRA (Pet. Br. 17-20), fails to mention the government's own interpretation of these various jurisdictional provisions, as advanced in the courts of appeals. First, under AEDPA 440(a), the INS affirmatively sought dismissal of circuit court review on the ground that the *circuit* courts no longer had jurisdiction, including in cases raising constitutional claims. *See Chow v. INS*, 113 F.3d 659, 663, 668 (7th Cir. 1997). In the First Circuit, the INS further stated that, notwithstanding AEDPA, it would assume that the *district courts* retained jurisdiction to review at least some claims in a habeas corpus proceeding.[10] Subsequently, under IIRIRA's transitional

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[9] The successor provision in the permanent IIRIRA statute appears at 8 U.S.C. 1252(a)(2)(C) (Supp. II 1996). It provides:

> "Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in [enumerated provisions]."

[10] *Goncalves v. Reno*, 144 F.3d 110, 115 (1st Cir. 1998) (noting that in an earlier AEDPA case "INS conceded . . . some form of

rules, the INS again sought dismissal of petitions for review in circuit court cases that raised both statutory and constitutional claims. In fact, the INS urged dismissal of the precise constitutional equal protection claim raised by the respondent in this case – a claim the government now contends *is* reviewable in the courts of appeals by means of a petition for review. *Compare* Pet. Br. 18-20 *with Goncalves v. Reno*, 144 F.3d 110, 118-19 (1st Cir. 1998) (noting that INS asserted neither claim was reviewable in any court).

The government also fails to note that when some immigrants sought *certiorari* review in this Court to challenge circuit court rulings denying direct review, the government opposed review by this Court on the basis, *inter alia*, that any claim to judicial review based on the Suspension Clause must await the filing of a habeas corpus petition.[11]

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habeas jurisdiction in the district court"). The INS did not specify what it believed was the proper statutory basis for habeas review in the district courts.

[11] Brief for the Respondent [INS] in Opposition at 23, *Katsoulis v. INS*, No. 97-379 (filed Nov. 1997), *cert. denied*, ___ U.S. ___, 118 S. Ct. 624 (1997) (opposing *certiorari* and arguing that any claim under Suspension Clause was not properly presented because petitioner "did not seek a writ of habeas corpus"); Brief for the [INS] in Opposition at 15, *Chamorro-Torres v. INS*, No. 96-985 (filed Jan. 1997), *cert. denied*, 520 U.S. 1103 (1997) (same); Brief for the [INS] in Opposition at 9, *Qasguargis v. INS*, No. 96-806 (filed Jan. 1997), *cert. denied*, 519 U.S. 1148 (1997) (same).

STATEMENT OF FACTS

1. Respondent Daniel Magaña-Pizano is a citizen of Mexico who has been a legal permanent resident of the United States for twenty-one years. Pet. App. 3a. He entered the United States legally as a five-year-old child with his parents and siblings. *Id.* In 1995, he pled guilty to a single misdemeanor offense of being under the influence of controlled substances. *Id.* At the time respondent pled guilty, he was eligible to apply for a discretionary waiver of deportation under 8 U.S.C. 1182(c).

On May 17, 1996, the INS commenced deportation proceedings based on the misdemeanor conviction. Pet. App. 3a. Respondent conceded deportability and applied for relief under Section 1182(c). Pet. App. 4a. The immigration judge (IJ) ruled that AEDPA 440(d) rendered respondent statutorily ineligible for Section 1182(c) relief. Pet. App. 5a. Respondent appealed to the BIA, which dismissed his appeal without exercising discretion, on the basis of the Attorney General's interpretation of Section 440(d) in *Matter of Soriano*. Pet. App. 5a. The BIA issued a final order of deportation, and respondent was taken into custody for deportation in May 1996, where he remains.

Respondent immediately filed a petition for writ of habeas corpus pursuant to 28 U.S.C. 2241. Respondent asserted that Section 440(d) violates equal protection and asked to amend the petition to allege that Section 440(d) did not apply retroactively to his case. Pet. Br. 9 & n.5. The district court dismissed the habeas corpus petition for lack of jurisdiction. Pet. App. 5a. Respondent appealed the habeas dismissal and also timely filed a petition for review directly in the court of appeals. Pet.

App. 5a. The Ninth Circuit consolidated respondent's appeal of the habeas dismissal with the petition for review.

In the court of appeals, respondent challenged AEDPA 440(d) on statutory retroactivity and constitutional equal protection grounds. He sought judicial review of both the statutory and constitutional claims in either the district court by means of his habeas corpus action under 28 U.S.C. 2241 or on direct review in the court of appeals by means of his petition for review. In support of district court jurisdiction, respondent asserted that, as a matter of statutory construction, neither AEDPA nor IIRIRA expressly mentioned or repealed the general grant of habeas corpus jurisdiction to the district courts in Section 2241, and that that grant of jurisdiction remained intact absent an express repeal under *Felker v. Turpin*, 518 U.S. 651 (1996).[12] Respondent also argued that his statutory and constitutional claims were encompassed

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[12] Both parties fully briefed the jurisdictional question of whether, as a matter of statutory construction, AEDPA or IIRIRA repealed district court habeas corpus jurisdiction under Section 2241, as *Hose v. INS*, 141 F.3d 932 (9th Cir. 1998), on which the court below subsequently relied in finding a repeal of Section 2241, was not decided until after the instant case was fully submitted. *See* Brief for Petitioner [Magaña-Pizano] at 15-16, *Magaña-Pizano v. INS*, 152 F.3d 1213 (9th Cir. 1998) (Nos. 97-15678 & 97-70384); Brief for Respondent [INS] at 12-14, *Magaña-Pizano v. INS*, 152 F.3d 1213 (9th Cir. 1998) (Nos. 97-15678 & 97-70384).

within the plain terms of 28 U.S.C. 2241(c)(1) & (3).[13] In support of his *constitutional* right to judicial review (in either the district court or the court of appeals), respondent asserted that the Suspension of Habeas Corpus Clause, Art. I, Sec. 9, Cl. 2, the separation of powers principle embodied in Article III, and the Due Process Clause of the Fifth Amendment entitled him to judicial review.

In response, the INS argued that *no* court had jurisdiction over either the constitutional or statutory claim. It argued that respondent's retroactivity claim could not be heard in either the district court in a habeas corpus action or in the court of appeal by petition for review. The INS further argued that the district court lacked jurisdiction over the equal protection claim, and contrary to the position taken here, that the court of appeals also lacked jurisdiction because direct review remained only for substantial constitutional claims causing a "fundamental miscarriage of justice." *See* Pet. App. 22a-23a.

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[13] 28 U.S.C. 2241 provides:

(c) The writ of habeas corpus shall not extend to a prisoner unless –

(1) He is in custody under or by color of the authority of the United States . . .
or

. . .

(3) He is in custody in violation of the Constitution or laws or treaties of the United States.

Looking first at its own direct review jurisdiction, the court of appeals found that the IIRIRA 309(c)(4)(G) transitional provision governed the petition for review (Pet. App. 6a-7a), that the provision barred respondent's claims (Pet. App. 7a-8a), and that under circuit precedent (interpreting AEDPA 440(a)), the court lacked jurisdiction because "Congress had [not] conferred it." Pet. App. 8a (citing *Duldulao v. INS*, 90 F.3d 396, 399-400 (9th Cir. 1996)).

Turning to the district court's habeas corpus jurisdiction, the court of appeals determined that it was bound by *Hose v. INS*, 141 F.3d 932 (9th Cir. 1998) (ruling that Section 1252(g) eliminated access to habeas corpus relief),[14] and posed the issue in this case as "whether [Section 1252(g)], as interpreted by *Hose* and applied to cases such as the one before us, violates the Suspension Clause . . . where no other avenue of judicial review exists." Pet. App. 11a-12a. After reviewing the history of habeas corpus in both the common law and immigration contexts, the court of appeals concluded that Section 1252(g) as construed by *Hose* violated the Suspension Clause in cases where no other avenue for review existed. Pet. App. 19a ("elimination of all judicial review of executive detention violates the Constitution"); *see also Henderson v. INS*, 157 F.3d 106, 120 (2d Cir. 1998) ("for at least a hundred years, the courts have reviewed the executive branch's interpretation of the immigration laws, and have

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[14] As discussed below, the Ninth Circuit has, since the filing of the government's petition, granted rehearing *en banc* and withdrawn the panel opinion in *Hose v. INS*, No. 97-15789, 1998 Daily Journal D.A.R. 12215 (9th Cir. Dec. 2, 1998).

deemed such review to be constitutionally mandated"), *petition for cert. filed sub nom. Reno v. Navas*, ___ U.S.L.W. ___ (U.S. Dec. 18, 1998) (No. 98-___).

Having ruled that Section 1252(g) could not constitutionally block access to habeas corpus, the court of appeals concluded that "to the extent habeas remedies in immigration cases are protected by the Suspension Clause, relief is afforded through the statutory remedy of 28 U.S.C. § 2241." Pet. App. 21a. It then ruled that respondent's constitutional and statutory claims fell within the scope of Section 2241 and remanded the case to the district court for a decision on the merits. Pet. App. 24a.

REASONS FOR DENYING THE WRIT

For the reasons set forth in Point 1, *infra*, *certiorari* should be denied. For the reasons set forth in Point 2, *infra*, if review is granted, respondent agrees with the government that this case (along with Magana-Pizano's conditional cross-petition), rather than *Goncalves*, presents the proper vehicle for addressing the *jurisdictional* issues because the respondent in this case filed both a district court habeas action *and* a petition for review in the court of appeals.

1. Review is not warranted because the Ninth Circuit has withdrawn its prior decision in *Hose v. INS* that resulted in the constitutional ruling in the decision below,

because no conflict exists among the circuits on the jurisdictional (or merits) question, because the jurisdictional issue arises from interim statutory provisions that apply only to transitional cases governed by expiring jurisdictional statutes, and because the decision is correct. The instant setting, involving temporary INA provisions that are so unclear that the government itself has interpreted them inconsistently, is not an appropriate vehicle for the Court to consider the far-reaching constitutional questions about the scope of Congress's power to limit judicial review of executive detention that would arise if Congress has repealed all grants of jurisdiction, including Section 2241.

a. There is no conflict among the circuit courts on either of the two jurisdictional questions the government presents: whether respondent may obtain judicial review of his retroactivity and equal protection claims (Pet. Br. I-II), and, if so, whether the district court or the court of appeals is the proper forum to raise those claims. *See* Pet. Br. 21-24. Three courts of appeals, the First, Second and Ninth, have squarely addressed both questions and agree that judicial review of both the statutory and constitutional claims is available and that the proper forum is the district court pursuant to 28 U.S.C. 2241. *See* Pet. App. 1a-24a; *Goncalves v. Reno*, 144 F.3d 110 (1st Cir. 1998); *Henderson v. INS*, 157 F.3d 106 (2d Cir. 1998). Six additional courts of appeals are now considering habeas corpus appeals that raise the same jurisdictional (and merits) claims presented by this case.[15] Consideration by

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[15] *LaGuerre v. INS*, No. 98-1954 and *Avelar-Cruz v. Reno*, No. 98-2613 (7th Cir.) (argued & submitted Oct. 29, 1998); *Gutierrez-*

this Court is premature unless and until an actual conflict between the circuits emerges. *Cf. Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387 (1923).[16]

The government contends that there is a conflict in the lower courts because the Seventh Circuit in *Yang v. INS*, 109 F.3d 1185 (7th Cir.), *cert. denied sub nom. Katsoulis v. INS*, ___ U.S. ___, 118 S. Ct. 624 (1997), has "disagreed with the proposition that aliens may proceed under Section 2241. . . . " Pet. Br. 27. Yet the government does not, and could not, maintain that *Yang held* that Section 2241 is no longer available for aliens such as the respondent in

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Martinez v. INS, No. 98-8185 and *Mayers v. Reno*, No. 97-5537 (11th Cir.) (argued & submitted Oct. 8, 1998); *Sandoval v. Reno*, No. 98-1099 (3d Cir.) (argued & submitted Sept. 28, 1998); *Shah v. Reno*, No. 98-2636 (8th Cir.) (argument scheduled Jan. 13, 1998); *Jurado-Gutierrez v. Greene*, No. 97-1437 (10th Cir.); *Pak v. Reno*, No. 98-3852 (6th Cir.).

[16] Although the First, Second and Ninth Circuits are the only courts of appeals to decide both the proper *forum* and the *scope* of review available to aliens with criminal convictions, other circuits have addressed the forum question and have rejected the government's position that all review under AEDPA and IIRIRA's transitional rules belongs in the courts of appeals. These courts stated or assumed that habeas corpus jurisdiction (or another avenue) remains available, and invited or instructed immigrants to seek review through such an action. *See, e.g., Lerma de Garcia v. INS*, 141 F.3d 215, 217 (5th Cir.) (rejecting government's position that aliens with criminal convictions can obtain review in courts of appeals and noting that "criminal deportees retain some opportunity to apply for writs of habeas corpus"), *reh'g en banc denied*, 159 F.3d 1358 (1998); *Turkhan v. INS*, 123 F.3d 487, 490 (7th Cir. 1997) (rejecting government's position that aliens with criminal convictions can seek review in courts of appeals and noting "possibility of a writ of habeas corpus").

this case; indeed, *Yang* was decided before IIRIRA took effect on April 1, 1997, and the alien was before the Seventh Circuit solely on a petition for review and had not filed a habeas petition. More importantly, the statements in *Yang* regarding the availability of Section 2241 have been superseded by subsequent decisions in the Seventh Circuit. Those decisions have rejected the government's position that the courts of appeals are the proper forum to seek review for aliens such as respondent, and in doing so, have specifically retreated from the *dicta* in *Yang* that suggested that Section 2241 is no longer available. *See Turkhan v. INS*, 123 F.3d 487, 490 (7th Cir. 1997) (noting "possibility of a writ of habeas corpus authorized under . . . [Section] 2241"); *Chow v. INS*, 113 F.3d 659, 668 (7th Cir. 1997) (same); *see also* Pet. Br. 27 (acknowledging the Seventh Circuit's subsequent *Turkhan* decision). Indeed, the precise jurisdictional question raised in the instant case remains pending in the Seventh Circuit. *See LaGuerre v. INS*, No. 98-1954 and *Avelar-Cruz v. Reno*, No. 98-2613 (7th Cir.) (argued and submitted Oct. 29, 1998) (appeals from habeas actions under Section 2241 challenging AEDPA 440(d) on retroactivity and equal protection grounds).

The government has also argued in the circuit courts that the Eleventh Circuit's recent decision in *Richardson v. Reno*, No. 98-4320, ___ F.3d ___, 1998 WL 850045 (11th Cir. Dec. 9, 1998), decided after the filing of the government's petition in this case, creates a split in the circuits because *Richardson* states in *dicta* that IIRIRA repealed Section 2241, and that review of final orders is available only in the court of appeals and only to the extent guaranteed by the Suspension Clause. *Richardson*, however, did not

involve an alien seeking judicial review of a final order of deportation. Indeed, Richardson's administrative proceeding remains pending in the BIA (*id.* at *3), and the litigation before the Eleventh Circuit concerned only his right to release from detention on bond pending the outcome of his removal proceeding. *See id.* at *2-*4. The Eleventh Circuit's discussion regarding the availability of Section 2241 to review *final orders* of deportation is therefore *entirely dicta*. The jurisdictional questions in the instant case regarding review of final orders remain pending in the Eleventh Circuit. *See Gutierrez-Martinez v. INS*, No. 98-8185 and *Mayers v. Reno*, No. 97-5537 (11th Cir.) (argued & submitted Oct. 8, 1998).

In short, there is no conflict in the circuit courts. All three circuits that have ruled in cases squarely presenting the jurisdictional issue raised by the government's petition in this case – the First, Second, and Ninth – have held that a statutory retroactivity and constitutional equal protection challenge to the Attorney General's decision in *Soriano* is properly litigated in a district court habeas action under Section 2241.

b. This case does not raise questions of lasting national importance warranting this Court's review because it arises under IIRIRA's *temporary* "transitional" judicial review rules and does not involve the *permanent* judicial review provisions of IIRIRA. The government attempts to cloud the temporary nature of the issue by arguing that the permanent counterpart to the applicable transitional provision, 8 U.S.C. 1252(a)(2)(C), "is substantively *identical*" and that the "courts in the future are *likely* to construe" (Pet. Br. 16 n.9) (emphasis added) the permanent provision in light of their interpretation of the

transitional rule. But elsewhere the INS has already argued that decisions construing the transitional provision of IIRIRA 309(c)(4)(G) do *not* govern cases under the permanent successor provision, 8 U.S.C. 1252(a)(2)(C).[17]

The fact that this case (like *Goncalves*, No. 98-835) involves only IIRIRA's transitional provisions strongly militates in favor of denying *certiorari*. If the Court were to find that Section 2241 remains available under IIRIRA's transitional rules, the Court's ruling would not eliminate the inevitable future litigation that will arise under IIRIRA's permanent provisions, unless the government were to definitively agree that interpretation of IIRIRA's transitional provisions conclusively settles the interpretation of IIRIRA's permanent provisions. Alternatively, if the Court were to find that the transitional rules did repeal 28 U.S.C. 2241 as well as all other statutory grants of jurisdiction over respondent's non-constitutional retroactivity claim, then the Court would have to decide historic constitutional questions regarding the reach of Congress's power to eliminate Article III review for individuals in executive detention in the context of an *interim* jurisdictional provision. If the Court is going to reach those far-reaching constitutional questions, it should not do so unless the *permanent* provisions are found to have repealed all statutory grants of jurisdiction, including Section 2241.

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[17] *See, e.g.*, Brief for Respondent-Appellee [INS] at 17-18 n.10, *Esparza-Treto v. Greene*, No. 98-1339 (10th Cir.) (filed Nov. 20, 1998) (*Magaña-Pizano* is "clearly limited to cases under the transitional rules and does not apply to cases under new Section 242.").

c. The court of appeals held that respondent's claims were reviewable in a district court habeas corpus action under 28 U.S.C. 2241. That ruling is correct both as a matter of statutory interpretation under the clear statement rule of *Felker v. Turpin*, 518 U.S. 651 (1996), and as a matter of constitutional right.[18]

As the First and Second Circuits have correctly recognized, the 1996 amendments to the INA do not repeal

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[18] The court below, unlike the First and Second Circuits, held that Section 2241 had been repealed, but ruled that the 1996 amendments were unconstitutional insofar as they left respondent without any judicial forum to raise his claims. Pet. App. 19a; *Hose v. INS*, 141 F.3d 932, 935 (9th Cir. 1998), *reh'g en banc granted & opinion withdrawn*, 1998 Daily Journal D.A.R. 12215 (9th Cir. Dec. 2, 1998). Accordingly, it held that Section 2241 must remain available for aliens, like respondent, who are subject to a bar on review in the courts of appeals. Pet. App. 20a-21a.

The court ruled on constitutional grounds only because it believed itself constrained by the Ninth Circuit's *now-withdrawn* opinion in *Hose*. *See* Pet. App. 18a. *Hose* involved an alien whose removal order was *not* based on a criminal conviction and who therefore did not face a bar on direct review in the court of appeals. *Hose*, 141 F.3d at 933. In that non-criminal context, *Hose* stated, in broad *dicta*, that IIRIRA repealed Section 2241 and made no exception for aliens who could not obtain review in the court of appeals. *Id.* at 935. Because the court below believed that it was bound by *Hose* on the question whether Section 2241 has been repealed, it proceeded to the constitutional questions raised by a total preclusion of review. Pet. App. 18a. *Hose* has now been withdrawn and the Ninth Circuit has granted rehearing *en banc* in that case, with argument scheduled for March 25, 1999. *See Hose v. INS*, No. 97-15789, 1998 Daily Journal D.A.R. 12215 (9th Cir. Dec. 2, 1998). The Ninth Circuit itself may therefore now conclude that Section 2241 has not been repealed (at least for aliens with criminal convictions).

Section 2241 because neither AEDPA's nor IIRIRA's provisions expressly mention Section 2241, much less contain the requisite express and unambiguous directive necessary to repeal that venerable statute. *Felker*, 518 U.S. at 661 (Section 2241 may not be repealed "by implication"); *see also Goncalves*, 144 F.3d at 122; *Henderson*, 157 F.3d at 119 (discussing holding of *Jean-Baptiste v. Reno*, 144 F.3d 212 (2d Cir. 1998)).[19]

The clear statement rule of *Felker* is not a formalistic requirement. It acts as a "signpost[ ], warning Congress that specific types of legislation, such as acts that . . . strip the courts of all jurisdiction, may give rise to constitutional difficulties." *Lee v. Reno*, 15 F. Supp. 2d 26, 38 (D.D.C. 1998).

The fact that AEDPA and IIRIRA are not sufficiently explicit to effectuate a repeal of Section 2241 is underscored by the government's own shifting interpretation of these transitional statutes. Indeed, in one circuit the INS stated that it would assume that any review that remained would occur in a *district court* habeas corpus petition. *Goncalves*, 144 F.3d at 115 (noting that in a prior AEDPA case "INS conceded . . . some form of habeas

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[19] The enactment of 8 U.S.C. 1105a in 1961 did not repeal Section 2241 expressly or by implication, and the amendments made by AEDPA and IIRIRA do not even mention Section 2241. New Section 1252(g), on which the government places special emphasis, also fails the *Felker* test because it does not expressly amend or mention Section 2241 even though it was enacted *after* this Court's unanimous and closely-watched *Felker* opinion removed any possible doubt that Congress knew of the necessity for explicit legislation to amend or repeal jurisdiction under Section 2241. *See Goncalves*, 144 F.3d at 122.

jurisdiction in the district court"). Moreover, INS sought dismissal in the circuits of the same claim it now insists is reviewable only in the courts of appeals (respondent's equal protection claim), and has argued in the past that any claim for review under the Suspension Clause had to await the filing of a habeas corpus petition. *See* note 11, *supra*. Now, the government abandons those earlier views and argues that IIRIRA's transitional provisions are clear and unambiguous and that the Court must therefore decide the far-reaching constitutional questions raised by a total preclusion of all Article III review over respondent's retroactivity claim.

The government contends that the court of appeals created "needless constitutional doubt" (Pet. Br. 16), and asserts, without explanation, that Section 309(c)(4)(G) could have been construed to allow jurisdiction over constitutional claims directly in the court of appeals by a petition for review. Pet. Br. 19-20. But even if construing Section 309(c)(4)(G) to allow review of *constitutional* claims were possible, doing so does not avoid the constitutional questions raised by the jurisdictional provisions of AEDPA and IIRIRA's transitional rules. The constitutional question remains whether judicial review of respondent's *non-constitutional* question of statutory interpretation (*i.e.*, whether the statute applies retroactively) can be barred. Construing IIRIRA to allow review of only constitutional claims does nothing to avoid that constitutional question.

Finally, even if Section 2241 has been repealed, the court of appeals properly recognized that respondent's claims are reviewable as a matter of constitutional right.

The constitutional basis for judicial review of respondent's statutory retroactivity and constitutional equal protection claims lies in the Suspension Clause, the Separation of Powers principle of Article III and the Due Process Clause of the Fifth Amendment. The government asserts that denying review of a statutory claim governing discretionary relief raises no constitutional issue. Pet. Br. 20-21. That is contradicted by decades of consistent judicial adjudication of such claims in habeas corpus proceedings, including by this Court. Under the immigration acts of 1891 and 1917, judicial review was prohibited except as "required by the Constitution." *Heikkila v. Barber*, 345 U.S. 229, 235 (1953). Throughout that period, however, the courts adjudicated habeas petitions by resident aliens alleging that a denial of discretionary relief was erroneous because it rested on a misconstruction of the immigration statute or some other non-constitutional error.

This Court twice reviewed the denial of discretionary deportation relief for *non-constitutional* error shortly after the Court affirmed in *Heikkila* that review was limited to the constitutional core. *See United States ex rel. Hintopoulos v. Shaughnessy*, 353 U.S. 72 (1957); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954). *Accardi* is especially significant because the Court exercised habeas jurisdiction and overturned the denial of discretionary relief over the specific objection of four dissenting Justices that habeas corpus jurisdiction did not extend to

claims arising from discretionary relief. *See Accardi*, 347 U.S. at 269 (Jackson, J., dissenting).[20]

The government has not pointed to a single habeas decision of this Court holding that review of a legal error concerning eligibility for discretionary relief from deportation can be insulated from all Article III review, including habeas corpus review. Absent an adequate and effective alternative avenue of review, the Suspension Clause requires review of both statutory and constitutional claims challenging eligibility to apply for relief from deportation. *See Swain v. Pressley*, 430 U.S. 372, 386 (1977) (Burger, C.J., concurring) ("[T]he traditional Great Writ was largely a remedy against executive detention"); *Brown v. Allen*, 344 U.S. 443, 533 (1953) (Jackson, J., concurring) ("The historic purpose of the writ has been to relieve detention by executive authorities without judicial trial.").

Judicial review of the legal claim presented here is also grounded in Article III. *See Commodities Future Trading Comm'n v. Schor*, 478 U.S. 833 (1986). Under Article III, respondent's legal claim cannot be adjudicated entirely by the Executive Branch without any access, by appeal or otherwise, to an Article III court. Likewise, the Due Process Clause requires access to a *judicial* forum to present respondent's statutory claim because deportation of a long-time legal resident implicates fundamental interests

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[20] The courts of appeals routinely reviewed claims denying discretionary relief during this period. *See, e.g., Mastrapasqua v. Shaughnessy*, 180 F.2d 999 (2d Cir. 1950) (Frank, J.); *United States ex rel. Kaloudis v. Shaughnessy*, 180 F.2d 489 (2d Cir. 1950) (L. Hand, J.).

"basic to human liberty and happiness." *Wong Yang Sung v. McGrath*, 339 U.S. 33, 50 (1950).

2. If the Court decides that review is warranted, respondent agrees in part, and disagrees in part, with the government's suggestion regarding which case(s) should be taken to ensure that there are no procedural obstacles to a complete resolution of the issues. First, respondent agrees with the government that the instant case is a better vehicle to address the *jurisdictional* issue than *Goncalves*. Unlike Goncalves, who filed only a district court habeas action, Magaña-Pizano filed *both* a district court habeas corpus action and a court of appeals petition for direct review. As the government notes, *Magaña-Pizano* is therefore the appropriate vehicle to address the jurisdictional issues because it "would allow this Court to render a definitive holding regarding the jurisdiction of *both* the courts of appeals *and* the district courts. . . . " Pet. Br. 29 (emphasis in original). In that respect, in order to ensure that the question of the court of appeal's jurisdiction is fully before the Court, respondent in this case is filing a conditional cross-petition seeking *certiorari* of the Ninth Circuit's dismissal of Magaña-Pizano's petition for review.[21]

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[21] The government has requested that the Court take both *Goncalves* (because only that case presents the merits) and *Magaña-Pizano* (because it presents the jurisdictional issues in the most comprehensive manner). Pet. Br. 28-29. Alternatively, the government suggests that if the Court takes only one case, it should take *Goncalves*, because *Magaña-Pizano* does not present the merits issue. However, the government would presumably agree with respondent that if the Court grants *certiorari* on *only* the *jurisdictional* issue, it should take *Magaña-Pizano*, and need

Second, respondent disagrees with the government that *Goncalves* presents an appropriate vehicle to address the *merits* issues. The government's own reasoning shows that it would make little sense for the Court to grant *certiorari* in *Goncalves* in order to address the retroactivity of Section 440(d). *Goncalves* will allow the Court to reach the merits issue *only* if the Court concludes that jurisdiction is proper *in a district court habeas action*. *See* Pet. Br. 29 (review of *Goncalves* will "preserv[e] the Court's ability to resolve [the merits issue] *if it concludes that the district court* in *Goncalves*" had jurisdiction) (emphasis added). But, if the Court were to conclude that jurisdiction over the retroactivity claim lies in the courts of appeals, then the merits issue will not be presented because Goncalves filed only a district court habeas action. Accordingly, the retroactivity issue should be considered, if at all, after the Court has determined whether, and where, jurisdiction is proper, or in a case where the alien filed both a habeas corpus action and a petition for direct circuit court review.

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not also take *Goncalves*, since *Goncalves* adds nothing to *Magaña-Pizano* on the jurisdictional issue.

CONCLUSION

For the reasons stated above, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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